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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 PROGRESSIVE WEST INSURANCE
COMPANY, an Ohio corporation,

Plaintiffs,

V.

BUN BUN TRAN, LEONEL ARRELLANO,

Defendants.

NO. 07-CV-1999 JAH (POR)

**DEFENDANT BUN TRAN'S MOTION
FOR SANCTIONS AGAINST
PLAINTIFF PROGRESSIVE WEST INS.
CO. AND ITS ATTORNEYS ROBBIE &
MATTHAI; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF;
DECLARATIONS OF JOSEPH DI
MONDA, ESQ., CHRISTOPHER E.
ANGELO, ESQ. AND ANH Q.D.
NGUYEN, ESQ.**

Time: 2:30 p.m.
Date: June 16, 2008
Ctrm.: 11
940 Front Street
San Diego, CA 92101

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 16, 2008, at 2:30 p.m., or as soon thereafter as the matter may be heard in the above-entitled court, located at 940 Front Street, San Diego, CA 92101, defendant and real party in interest Bun Bun Tran, by and through his guardian ad litem Le Thi Nguyen, will move the court for an Order imposing sanctions upon Progressive West Insurance Company and its attorneys Robbie & Matthai

1 for the filing of a frivolous lawsuit, in bad faith and for attempting to amnipulte the
2 federal judiciary in a scheme designed to obtain the default of its insured and defendant
3 Leonel Arrellano so as to escape any potential bad faith liability arising out of an action in
4 the San Diego Superior Court.

5 Bun Tran will requests that the Federal District Court, using its inherent powers:
6 1) Order Progressive to not file another complaint against Arrellano in federal court
7 without paying for an independent attorney to represent him pursuant to California Civil
8 Code § 2860; 2) Order Progressive to pay for and retain an independent attorney now to
9 inform Arrellano of what Progressive attempted to do to him, what Progressive's federal
10 complaint means and what could have happened had Progressive been successful in
11 taking his default; 3) Order Progressive and its attorneys to pay monetary sanctions to the
12 Court for causing a waste of judicial resources and for their attempt to manipulate the
13 judicial system and for omitting documentary evidence in papers submitted to the Court.

14 The motion will be based upon this Notice of Motion and Motion, the
15 Memorandum of Points and Authorities filed herewith, the Declarations of Joseph Di
16 Monda, Esq, Christopher E. Angelo, Esq., Anh Q.D. Nguyen, Esq., attached exhibits and
17 the pleadings and papers filed herewith.

18
19
20 May 13, 2008

21 ANGELO & DI MONDA, LLP

22 By: S/Joseph Di Monda
23 Christopher E. Angelo
24 Joseph Di Monda
25 Attorneys for Defendants,
26 Bun Bun Tran and Le Thi Nguyen
27
28

TABLE OF CONTENTS

I.	INTRODUCTION	p. 1
II.	RELEVANT FACTS	p. 1
	A. The Accident Giving Rise to Progressive's Liability	p. 1
	B. The State Action	p. 2
	C. Progressive Rejected Tran's Policy Limit Demand for Arrellano's Policy Limits.	p. 2
	D. The Federal Action	p. 3
	E. Progressive Engaged in A Scheme to Manipulate Both the State and Federal Courts to Escape its Bad Faith.	p. 4
III.	PROGRESSIVE'S COMPLAINT FOR DECLARATORY RELIEF WAS FRIVOLOUS, TOTALLY WITHOUT MERIT, AND NO REASONABLE ATTORNEY WOULD HAVE FILED IT	p. 5
IV.	PROGRESSIVE FILED THE FEDERAL ACTION FOR AN IMPROPER PURPOSE; IT IS A SHAM PLEADING DESIGNED TO MANIPULATE THE JUDICIAL PROCESS	p. 7
	A. Progressive's Manipulation of the Federal Courts	p. 7
	B. Progressive's Manipulation of the State Courts	p. 9
	C. Progressive's Motivation To Manipulate the Courts	p. 12
V.	PROGRESSIVE HAS USED ITS FEDERAL LAWYERS TO MISLEAD THIS COURT BY OMITTING ALL DAMAGING EVIDENCE IN PAPERS SUBMITTED TO THIS COURT	p. 13
VI.	THIS COURT HAS THE POWER TO IMPOSE SANCTIONS AGAINST PROGRESSIVE AND ITS ATTORNEYS	p. 15
	A. This Court May Sanction Both Progressive and Its Attorneys.	p. 15
	B. Progressive and Its Attorneys Acted in Bad Faith	p. 15
	C. Both Progressive and its Attorneys Should be Sanctioned	p. 16
VII.	REQUESTED SANCTION	p. 17
VIII.	CONCLUSION	p. 17
	Declaration of Joseph Di Monda, Esq.	p. 17
	Declaration of Christopher E. Angelo, Esq.	p. 21

TABLE OF AUTHORITIES

Cases

3	<i>Antonio v. Solomon</i> (1967) 42 FRD 320	p. 8
4	<i>Budget Rent-A-Car, Inc. v. Higashiguchi</i> (9th Cir. 1997) 109 F.3d 1471	p. 6
5	<i>Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.</i> (1991) 498 U.S. 533	p. 5
6	<i>Buster v. Greisen</i> (9th Cir. 1997) 104 F.3d 1186	p. 15
7	<i>Cabell v. Petty</i> (4 th Cir. 1987) 810 F.2d 463	p. 5
8	<i>Chambers v. NASCO, Inc.</i> (1991) 501 U.S. 32	p. 14
9	<i>Eastway Construction Corp. v. City of New York</i> (2nd Cir. 1985) 762 F.2d 243	p. 15
10	<i>Flatt v. Superior Court</i> (1994) 9 Cal.4th 275	p. 9
11	<i>Hartford, Ins. Group v. Lou-Con Inc.</i> (5 th Cir. 2002) 293 F.3d 908	p. 7
12	<i>Johnson v. Wattenbarger</i> (7th Cir. 2004) 361 F.3d 991	p. 5
13	<i>Lazzarevich v. Lazzarevich</i> (1952) 39 Cal.2d 48	p. 7
14	<i>Lipsig v. National Student Marketing Corp.</i> (DC Cir. 1980) 663 F.2s 178	p. 15
15	<i>Lockary v. Kayfetz</i> (9th Cir. 1992) 974 F.2d 1166	p. 14
16	<i>Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.</i> (1995) 36 Cal.App.4th 1832	p. 9
17	<i>Nationwide Mut. Ins. Co. v. Rowles by Rowles</i> (E.D. Pa. 1993) 818 F. Supp. 852	p. 6
18	<i>Smith v. Ricks</i> (9 th Cir. 1994) 31 F.3d 1478	p. 5
19	<i>State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.</i> (1999) 72 Cal.App.4th 1422	p. 7, 9

1	<i>U.S. v. Shaffer Equipment Co.</i> (1993) 11 F.3d 450	p. 13
3	<i>Valhal Corp. v. Sullivan Assocs., Inc.</i> (3rd Cir. 1995) 44 F3d 195	p. 5
4	<i>Williams v. Superior Court</i> (1996) 46 Cal.App.4th 320	p. 13
6	<i>Willy v. Coastal Corp.</i> (1992) 503 U.S. 131	p. 15
7	<i>Zaldivar v. City of Los Angeles</i> (9 th Cir. 1986) 780 F.2d 823	p. 5, 16

9 Statutes

10	Federal Statutes	
11	28 USCA § 1332(a)	p. 5
12	Fed. Rules of Civ. Proc. Rule 11(b)(2)	p. 15
14	State Statutes	
15	California Civil Code Section 2860	p. 16
16	California Code of Civil Procedure Section 2033.250	p. 11

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Bun Bun Tran, by and through his Guardian ad Litem, Le Thi Nguyen (“Nguyen”) requests that this Court use its inherent power to sanction Progressive West Insurance Company (“Progressive”) and its attorneys, Robbie & Matthai, for the bad faith filing of frivolous pleadings and for intentional misleading and deceptive conduct in this litigation designed to manipulate the courts and abuse the judicial process. Said conduct as described more fully herein, also violates Rule 11.

Sanctions are appropriate here because the filing of this federal lawsuit was part of a larger scheme by Progressive to use both the federal and state courts as unwitting accomplices in order to obtain Leonel Arrellano’s (“Arrellano”) default in this litigation, escape its bad faith and leave Arrellano with a huge ten figure judgment. Progressive, with the assistance of Arrellano’s lawyers in the state lawsuit has attempted to manipulate both the federal and state judicial systems to protect itself and AIG, another insurance carrier in the state action.

II. RELEVANT FACTS

A. The Accident Giving Rise to Progressive's Liability

On November 18, 2006, Arrellano was intoxicated and failed to stop at a stop sign. Bun Tran (“Tran”) had the right-of-way and his vehicle was crossing an intersection when Arrellano collided with Tran. Arrellano fled the accident scene, was subsequently arrested, and charged with violations of Veh. Code § 23153, DUI causing injuries, Veh. Code § 12500(a), driving without a license and Veh. Code § 20001, Hit and Run with injuries. Said violations are felonies. Exh. 1, Arrest Report; Decl. of Christopher E. Angelo.

Tran was catastrophically injured and was taken to the U.C. San Diego Medical Center where he stayed for approximately 3 months in a coma. Tran is presently at Coronado Sharp Medical Center in a non-communicative vegetative state. Tran's future lifetime medical care costs will be in the range of \$40 million dollars. Decl. of

1 Christopher E. Angelo.

2 Arrellano is an indigent illegal alien who does not speak, read or understand
 3 English. Decl. of Christopher E. Angelo, Esq. Arrellano pled guilty to various State
 4 felonies and is currently incarcerated and serving approximately 6 years at the Sierra
 5 Conservation Center in Northern California. Arrellano will be deported to Mexico upon
 6 completion of his sentence. Decl. of Christopher E. Angelo.

7 **B. The State Action**

8 Tran, by and through his guardian ad litem Nguyen filed a state personal injury
 9 action against: 1) Arrellano; 2) Brinker International Inc., dba Chili's Restaurant
 10 ("Chili's") Arrellano's employer; 3) Patricia Cole; and, 4) the City of San Diego. *Tran v.*
 11 *Arrellano et al.*, San Diego Superior Court Case No. 37-2007-00065432-CU-PA-CTL,
 12 the Hon. Ronald L. Styn, Judge. ("the State Action"). Exhibit 2, State complaint. See
 13 Request for Judicial Notice.

14 Progressive has a duty to defend and indemnify Arrellano for the automobile
 15 accident with Tran.

16 **C. Progressive Rejected Tran's Policy Limit Demand for Arrellano's
 17 Policy Limits.**

18 Arrellano has a \$15,000 automobile liability insurance policy issued by
 19 Progressive. Tran's attorney at the time was Anh Q. D. Nguyen. He made a policy limit
 20 demand on Progressive requesting that Progressive tender Arrellano's \$15,000 policy
 21 limit in return for a complete release of all claims. Exh. 3, Jan. 26, 2007 letter from Anh
 22 Nguyen, Esq., Decl. of Anh Q.D. Nguyen, Esq.

23 In a series of letters, Progressive refused to pay Arrellano's policy limits and
 24 denied Tran's policy limit demand. Exhs. 4-6, Letters from Progressive; Decl. of Anh
 25 Q.D. Nguyen, Esq. Progressive has still not made any offer to pay Arrellano's \$15,000
 26 policy limit. Decl. of Anh Q.D. Nguyen, Esq.

27 **D. The Federal Action**

28 With the State Action pending, Progressive filed this action for declaratory relief

1 (“the Federal Action”) requesting this Court to declare that it did not commit bad faith in
 2 its handling of the policy limit demand arising out of the State Action and that it would
 3 not be liable for any over-limits bad faith in the event Arrellano is adjudged to owe Tran
 4 more than \$15,000. Progressive knew that Arrellano was indigent and incarcerated
 5 because it was paying for his State Action defense. Decl. of Christopher E. Angelo, Esq.
 6 Despite knowing that Arrellano had counsel, Progressive served Arrellano with the
 7 federal summons and complaint at the Sierra Conservation Center, bypassing his state
 8 lawyers.

9 Progressive knew that Tran was in a coma and represented by counsel. Despite
 10 that knowledge, Progressive did not contact Tran’s attorneys to even inform them of its
 11 lawsuit. Instead, Progressive used substituted service on Tran’s guardian ad litem, who
 12 also does not speak or read English, to serve the federal summons and complaint on Tran,
 13 thereby also bypassing Tran’s lawyers. Exh. 7, Proof of Service on federal summons and
 14 complaint; Decl. of Christopher E. Angelo, Esq.

15 On or about November 24, 2007, Tran moved to dismiss the Federal Action for
 16 lack of diversity jurisdiction. Progressive opposed Tran’s motion and the parties
 17 completed briefing on or about January 2, 2008. *See*, Request for Judicial Notice.

18 On January 7, 2008, this Court Ordered that the oral arguments on Tran’s motion
 19 to dismiss be vacated and that the Court would issue its ruling on Tran’s Motion to
 20 Dismiss in due course. *See*, Request for Judicial Notice. Because Arrellano was not
 21 represented by counsel he never made an appearance in the Federal Action.

22 On or about April 8, 2008, Progressive requested that the clerk of the U.S. District
 23 Court enter default against Arrellano due to his failure to file a responsive pleading to its
 24 federal complaint. *See*, Request for Judicial Notice., Progressive’s Requests to Enter
 25 Default Against Arrellano. *See* Request for Judicial Notice.

26 On or about April 9, 2008, Tran, on behalf of himself, moved this Court to set
 27 aside Arrellano’s default. Tran’s Motion to Set Aside Default. *See* Request for Judicial
 28 Notice.

1 On April 9, 2008, the Clerk of the U.S District Court entered Arrellano's Default.

2 *See Request for Judicial Notice.*

3 On or about April 23, 2008, Progressive filed and served notice that it was
4 presenting its Application for Default Judgment against Arrellano. Progressive's
5 Application for Default Judgment against Arrellano. *See Request for Judicial Notice.*

6 On April 29, 2008, this Court Ordered that Progressive's Federal Action be
7 dismissed in its entirety against all parties, including Arrellano, for lack of diversity
8 jurisdiction. Order Granting Defendant's Motion to Dismiss for Lack of Subject Matter
9 Jurisdiction. *See Request for Judicial Notice.*

10 As a result of the dismissal, all matters related to Arrellano's default became moot.

11 **E. Progressive Engaged in A Scheme to Manipulate Both the State and**
12 **Federal Courts to Escape its Bad Faith.**

13 Progressive realizes that if Arrellano's adjudicated share of Tran's damages
14 exceed Arrellano's \$15,000 liability policy limit, that either Arrellano or Tran, through
15 Arrellano's assignment of his bad faith rights against Progressive, may be found guilty of
16 bad faith. Progressive could then become liable for Arrellano's over-limit judgment.

17 Progressive, knowing that it rejected Tran's policy limit demand, thereafter
18 engaged in a scheme, using its state lawyers, and both the state and federal judicial
19 systems, which if it had been successful may have resulted in Progressive escaping its bad
20 faith, leaving its insured Arrellano with an uninsured multi-million dollar judgment, and
21 leaving Tran, who is in a coma, as a ward of the State, with the taxpayer paying for his
22 medical care, all with the help of Progressive State Action lawyers.

23 Part of Progressive's scheme was to file a frivolous federal complaint against its
24 insured Arrellano for declaratory relief asking this Court to declare that Progressive did
25 not commit bad faith. Progressive and its lawyers knew that this Court did not have
26 jurisdiction because the minimum amount in controversy did not meet the \$754,000
27 threshold. Progressive knew Arrellano could not defend himself. Progressive intended to
28 keep Arrellano without counsel and affirmatively refused to pay for Arrellano's defense

1 in the Federal Action. Progressive knew that without counsel Arrellano default could be
 2 taken. Progressive also attempted to short notice Tran by using substituted service on his
 3 Mother by leaving the summons and complaint with a neighbor. Decl.of Joseph Di
 4 Monda. Progressive's service violated California law. Progressive knew Tran was
 5 represented by counsel but never bothered to contact his State Action lawyers to inform
 6 them of the pending federal lawsuit.

7 What Progressive did not count on was the Tran's lawyers would find out about
 8 the Federal Action with sufficient time to file a motion to dismiss.

9 **III. PROGRESSIVE'S COMPLAINT FOR DECLARATORY RELIEF WAS**
 10 **FRIVOLOUS, TOTALLY WITHOUT MERIT, AND NO REASONABLE**
 11 **ATTORNEY WOULD HAVE FILED IT**

12 Progressive's Federal Action had no merit because the federal court lacked
 13 jurisdiction and Progressive knew of the jurisdictional problems. Diversity jurisdiction
 14 exists only where the amount in controversy exceeds \$75,000.00. 28 USCA § 1332(a).
 15 The jurisdictional issues related to Progressive's complaint are straight out of a first year
 16 law school civil procedure textbook.

17 Progressive had an affirmative duty to investigate both law and fact to avoid the
 18 filing of a frivolous complaint. *Business Guides, Inc. v. Chromatic Communications*
 19 *Enterprises, Inc.* (1991) 498 U.S. 533, 550. Moreover, when determining if the pleading
 20 was frivolous or filed in bad faith, the standard is an objective standard, not subjective,
 21 and even applies to frivolous pleadings which are filed due to inexperience and
 22 incompetence. *Zaldivar v. City of Los Angeles* (9th Cir. 1986) 780 F.2d 823, 831; *Cabell*
 23 *v. Petty* (4th Cir. 1987) 810 F.2d 463, 466. Progressive finds no relief by operating with
 24 an "empty head." *Smith v. Ricks* (9th Cir. 1994) 31 F.3d 1478, 1488.

25 Progressive's pleadings are frivolous and filed in bad faith because the law is well
 26 settled that when the dispute involves a contract amount diversity jurisdiction will only
 27 exist if the contract damages exceed the diversity minimum. *Valhal Corp. v. Sullivan*
 28 *Assocs., Inc.* (3rd Cir. 1995) 44 F3d 195, 209; *Johnson v. Wattenbarger* (7th Cir. 2004)

1 361 F3d 991, 993.

2 As applied here, the law is well settled that a party cannot meet the jurisdictional
 3 amount by seeking a declaration of additional extracontractual damages not in issue at
 4 that time. *Nationwide Mut. Ins. Co. v. Rowles by Rowles*, (E.D. Pa. 1993) 818 F. Supp.
 5 852. Moreover, in declaratory judgment suits involving liability insurance policies, the
 6 test of jurisdiction is the maximum amount for which the insurer might be liable under the
 7 policy. *Budget Rent-A-Car, Inc. v. Higashiguchi*, (9th Cir. 1997) 109 F.3d 1471, 1473.

8 Despite this knowledge, Progressive attempted to include extra-contractual
 9 damages in an attempt to meet the minimum requirements for diversity. One only need to
 10 read Progressive's complaint to verify what it was attempting to do.

11 Moreover, despite this clear prohibition on the filing of cases where the diversity
 12 jurisdiction is based upon extra-contractual liability, Progressive not only admitted in its
 13 complaint that the insurance policy was capped at \$15,000, but that it was seeking
 14 declaratory relief that its behavior in allegedly denying the policy limit demand did not
 15 expose it to extra-contractual liability. This is exactly what the law prevents Progressive
 16 from requesting. Progressive would have known this had it fulfilled its duty to
 17 investigate the law.

18 Additionally, Progressive made no attempt to hide the fact that it was including
 19 speculative extra-contractual liability when it argued in its opposition to Tran's Motion to
 20 Dismiss, that the measure of damages is not the \$15,000 insurance contract cap, but the
 21 potential bad faith damages which Progressive may face in the future. See, Progressive's
 22 Opposition to Tran's Motion to Dismiss. Progressive's Opposition underscores the fact
 23 that it knew of this simple first year law school jurisdictional concept when it cited to
 24 *Hartford, Ins. Group v. Lou-Con Inc.* (5th Cir. 2002) 293 F.3d 908.

25 Hence, the lawsuit had no merit and was filed for an improper purpose, to obtain
 26 Arrellano's default and try to use this Court to circumvent the State Action and the
 27 anticipated bad faith overlimits lawsuit. Had Tran's lawyers not obtained the federal
 28 summons and complaint in time to file the Motion to Dismiss, Progressive may have

1 gotten away with its scheme.

2 **IV. PROGRESSIVE FILED THE FEDERAL ACTION FOR AN IMPROPER
3 PURPOSE; IT IS A SHAM PLEADING DESIGNED TO MANIPULATE
4 THE JUDICIAL PROCESS**

5 **A. Progressive's Manipulation of the Federal Courts**

6 Progressive filed the Federal Action knowing that Arrellano would not be able to
7 defend himself because it engaged in affirmative conduct designed to prevent Arrellano
8 from obtaining an attorney to represent him. Exh. 8, Letter from Arrellano's State
9 Action lawyers verifying that Progressive refused to pay for Arrellano's defense in the
10 Federal Action. By so doing, Progressive was manipulating the Federal Action in a
11 manner designed to obtain Arrellano's default. Progressive had no intention of permitting
12 Arrellano to defend the Federal Action.

13 For example, Progressive knew that Arrellano was incarcerated, indigent and could
14 not read, speak or understand English because it was paying a lawyer to defend Arrellano
15 in the State Action. Hence, Progressive was also the lawyer's client. An attorney
16 represents two clients, the insured and the insurer." *State Farm Mut. Auto. Ins. Co. v.*
17 *Federal Ins. Co.* (1999) 72 Cal.App.4th 1422. The knowledge of Arrellano's State
18 Action lawyers is imputed to Progressive because "a person is held to know what his
19 attorney knows and should communicate to him." *Lazzarevich v. Lazzarevich* (1952) 39
20 Cal.2d 48, 50.

21 Despite this knowledge, Progressive sued Arrellano in federal court and refused to
22 pay for Arrellano's defense. Arrellano's Progressive paid lawyers in the State Action
23 claim that they requested that Progressive pay for an attorney to defend Arrellano in the
24 Federal Action. According to Arrellano's State Action lawyers, Progressive refused to
25 pay for Arrellano's defense costs and therefore Arrellano's lawyers did not file any
26 responsive pleadings on his behalf to prevent his default. Decl. of Joseph Di Monda, Esq.

27 When Tran's lawyers, Angelo & Di Monda, found out about the Federal Action,
28 they contacted Arrellano's State Action lawyers and informed them that they could obtain

1 legal counsel for Arrellano in the Federal Action. Exhibit 9, Letter from Angelo & Di
 2 Monda; Decl. of Christopher E. Angelo, Esq.

3 Even more indicative of the manipulation of the process is the fact that although
 4 Arrellano's State Action lawyers admitted that they were not representing Arrellano in the
 5 defense of the federal action because Progressive would not pay them, Arrellano's State
 6 Action lawyers told Angelo & Di Monda that they were not permitted to have an
 7 independent lawyer contact Arrellano, nor could they have any other attorney contact
 8 Arrellano for any reason because he was already represented by counsel. Arrellano's
 9 Progressive paid lawyers made veiled threats of State Bar action if Angelo & Di Monda
 10 attempted to obtain legal counsel for Arrellano in the Federal Action. Decl. of
 11 Christopher E. Angelo, Esq. *See* Exhibit 10, Letter from Winet instructing Angelo & Di
 12 Monda not to have any attorney contact his client.

13 Moreover, Tran's Motion to Dismiss for lack of jurisdiction constituted an
 14 appearance which prevented his default from being taken. Arrellano's default could have
 15 been prevented had Arrellano's State Lawyers simply filed a joinder in Tran's motion to
 16 dismiss. Any response indicating an intent to defend prevents entry of default. *Antonio v.*
 17 *Solomon* (1967) 42 FRD 320, 322. This raises a question that Tran would like this Court
 18 to investigate; why didn't Arrellano's lawyers do anything to prevent his default in the
 19 Federal Action.

20 Progressive, having assured themselves that Arrellano was not represented by
 21 counsel in the Federal Action filed a Notice of Entry of Default against its own
 22 incarcerated and indigent insured Arrellano for his failure to make an appearance in the
 23 Federal Action. A failure which Progressive engineered by the filing of a frivolous
 24 federal complaint and denial of a defense.

25 Progressive knows that the reason Arrellano had not made an appearance was
 26 because he has no money to pay for a lawyer, cannot read the complaint, and does not
 27 know what it means or what to do even if he could read the complaint.

28 By filing the Federal Action Progressive was attempting to use the Federal courts

1 to do an end run around the State Court Action by obtaining Arrellano's default. Had
 2 Progressive been successful, it would then argue that it is not responsible for its own
 3 alleged bad faith against Arrellano relative to an overlimits judgment in the State Action.

4 Progressive's entire motivation was to manipulate the system and escape liability
 5 for its bad faith. That is why Progressive filed a frivolous Federal Action. Sadly, it
 6 appears Arrellano's Progressive paid lawyers went along with the scheme.

7 **B. Progressive's Manipulation of the State Courts**

8 At the same time Progressive was attempting to manipulate the federal judiciary, it
 9 was also using its lawyers to manipulate the State court system.

10 This Court should know that Arrellano's Progressive paid lawyers, who evidently
 11 cooperated with Progressive to obtain Arrellano's default in the Federal Action, also
 12 represented AIG in other lawsuits. Exh. 11, Letter from Winet admitting his law firm
 13 also represents AIG. AIG is the insurer for Chili's, another defendant in the State Action.

14 Pursuant to California law, AIG was also a client of Arrellano's lawyers. "The
 15 issue of whether an attorney-client relationship is formed between an insurance company
 16 and the counsel it hires to defend an insured has arisen in several contexts. In analyzing
 17 these situations, the courts have described counsel's representation as 'triangular.'
 18 (citations omitted). In other words, the attorney represents two clients, the insured and
 19 the insurer." *State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th
 20 1422, 1428-1429.

21 The "courts and ethical codes alike prohibit an attorney from simultaneously
 22 representing two client adversaries, even where the substance of the representations are
 23 unrelated." *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.* (1995) 36 Cal.App.4th 1832,
 24 1840 (citing *Flatt v. Superior Court*, (1994) 9 Cal.4th 275, 285. See *State Farm Mutual*
 25 *Auto. Ins. Co., v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422.

26 This prohibition did not stop Arrellano's Progressive paid lawyers from
 27 representing Arrellano even though its other client, AIG, had an adverse interest.

28 On March 21, 2008, while the federal action was pending, Chili's, who would be

1 jointly and severely liable for Arrellano's damages, propounded Requests for Admissions
2 ("RFA") against Arrellano, asking him to make damaging admissions which would
3 permit Chili's to escape, or severely reduce its liability. Chili's Requests for Admission
4 to Arrellano, Set Two. Request for Judicial Notice.

5 Although Arrellano's responses were not due until April 28, 2008, Arrellano
6 responded to Chili's RFA's on April 3, 2008, just 14 days later and 21 days before he was
7 required to serve his responses. Arrellano's Responses to Chili's RFA's Set Two.
8 Request for Judicial Notice.

9 When Tran propounded discovery against Arrellano, Arrellano's Lawyers asked
10 for extension of time to respond because they claimed it was difficult to communicate
11 with Arrellano given his incarceration. Decl. of Christopher E. Angelo, Esq. Suddenly
12 Arrellano's Lawyers can turn around Chili's discovery in less than 2 weeks.

13 The trial date for the State Action is August 1, 2008. The last day to serve a
14 motion for summary judgment in the State Action was April 21, 2008.

15 On April 4, 2008, the day after Arrellano mailed his responses to Chili's, Chili's
16 mailed its MSJ against Tran, using all of Arrellano's damning admissions in a manner
17 which could assist Chili's and AIG in escaping liability for the Accident.

18 Chili's was able to incorporate Arrellano's responses to its RFA's into its MSJ
19 before Chili's even could have received Arrellano's responses. Decl. of Joseph Di
20 Monda. The ability of Chili's to incorporate Arrellano's responses, which it had not yet
21 received, in its MSJ could not be accomplished without the cooperation of Arrellano's
22 Progressive paid Lawyers.

23 This cooperation raises a number of issues which raise questions related to abusing
24 the judicial systems. First, how did Chili's use Arrellano's responses in an MSJ which it
25 filed on April 4, 2008, when Arrellano did not even mail his responses to Chili's until
26 April 3, 2008 and Chili's could not have received them until the next day at the earliest?
27 How was Chili's able to draft, serve and file a very long and complicated summary
28 judgment motion and statement of undisputed facts using the responses from Arrellano

1 which it could not have received until the next day?

2 The second issue raised is that Arrellano's verifications to the damaging RFA's are
 3 dated March 3, 2008, 3 weeks before Chili's even mailed the RFA's to his attorneys.

4 The third issue raised by Arrellano's responses is that pursuant to Code of Civ.
 5 Proc. § 2033.250, Arrellano did not have to serve his RFA responses until April 28, 2008,
 6 which coincidentally was the last day Chili's had to file a MSJ. However, had Arrellano
 7 taken the time permitted by the CCP § 2033.250 to respond, Chili's may not have been
 8 able to file its MSJ.

9 Finally, why would Arrellano's Progressive paid lawyers permit him to quickly
 10 serve damaging responses to Chili's RFA's which they knew would be used to deflect all
 11 responsibility from Chili's and AIG and back to Arrellano, leaving Arrellano with no
 12 possibility of equitable contribution from Chili's. At the very least Arrellano's Lawyers
 13 should have prevented this by taking the code permitted time to respond, thereby
 14 zealously advocating for their client Arrellano. Instead it appears that Arrellano's lawyers
 15 protected AIG, their other client, and also protected Progressive by simultaneously
 16 permitting it to take Arrellano's default in the Federal Action.

17 It becomes evident that Arrellano's Progressive paid lawyers have not advocated in
 18 his interests and have specifically failed to act to Arrellano's detriment in both the Federal
 19 Action and the State Action. Instead, Arrellano's Progressive paid lawyers appear to be
 20 acting in Progressive and AIG's interests. This issue has been raised in the State court
 21 and is the subject of a motion to disqualify Arrellano's Progressive paid lawyers. Decl. of
 22 Joseph Di Monda, Esq.

23 **C. Progressive's Motivation To Manipulate the Courts**

24 Progressive's scheme is to have Arrellano left with an uninsured over-limits
 25 judgment in the State Action, protect itself, and secondarily to protect another insurer,
 26 AIG. Progressive knows that Arrellano has no assets and will be deported upon
 27 completion of his sentence.

28 If Progressive and AIG, with Progressive's cooperation, can have Arrellano

1 become liable for the full amount of Tran's judgment, all Progressive then has to do is use
 2 the federal courts to obtain Arrellano's default in a bad faith case and both Progressive
 3 and AIG escape their duty to indemnify and Progressive escape its own overlimits bad
 4 faith liability.

5 Progressive can obtain this result in two ways. If Arrellano is still incarcerated
 6 when the State Action and all appeals are completed, Progressive can file another federal
 7 action for declaratory relief relative to its bad faith, refuse to pay for Arrellano's defense
 8 again, and obtain his default, thereby escaping over-limits liability.

9 Alternatively, if Arrellano is no longer incarcerated, he will be deported to Mexico
 10 and even if Tran has obtained an over-limits judgment, Tran will not be able to collect.

11 Tran, who is in a coma, will become ward of the State and the taxpayer will pay
 12 for his medical care, while Progressive, who is responsible for the excess judgment will
 13 escape liability, all with the help of Arrellano's Lawyers

14 Tran's lawyers are aware of Progressive's scheme and know that once Arrellano is
 15 released, he will be deported to Mexico. Tran's lawyers are aware that Arrellano has little
 16 assets. Tran's lawyers know that all Arrellano has to offer of substance to Tran is an
 17 assignment of his bad faith rights against Progressive to Tran. Tran has been attempting
 18 for months, albeit unsuccessfully, to obtain an assignment from Arrellano of his bad faith
 19 rights against Progressive. Decl. of Christopher E. Angelo, Esq.

20 Progressive also knows this and with the cooperation of Arrellano's Progressive
 21 paid lawyers, Tran has not been able to obtain Arrellano's bad faith rights against
 22 Progressive. Progressive's paid lawyers have refused to permit Arrellano to assign his
 23 bad faith rights against Progressive unless Tran is willing to agree never to execute the
 24 overlimits judgment against Arrellano. Decl. of Christopher E. Angelo. Without an
 25 assignment of Arrellano's bad faith rights, Tran has nothing.

26 Tran knows that if he agrees never to execute the over-limits judgment against
 27 Arrellano, Progressive will argue that there is no bad faith because Tran has waived his
 28 right to collect the over-limits judgment and agreed to accept the \$15,000 liability policy.

1 Plaintiff suggests that Progressive's scheme is an abuse of the entire judicial
 2 system.

3 **V. PROGRESSIVE HAS USED ITS FEDERAL LAWYERS TO MISLEAD**
 4 **THIS COURT BY OMITTING ALL DAMAGING EVIDENCE IN PAPERS**
 5 **SUBMITTED TO THIS COURT**

6 "A member of the State Bar shall not seek to mislead the judge, judicial officer, or
 7 jury by an artifice or false statement of fact or law. Honesty in dealing with the courts is
 8 of paramount importance, and misleading a judge is, regardless of motives, a serious
 9 offense. Counsel should not forget that they are officers of the court, and while it is their
 10 duty to protect and defend the interests of their clients, the obligation is equally
 11 imperative to aid the court in avoiding error and in determining the cause in accordance
 12 with justice and the established rules of practice." *Williams v. Superior Court* (1996) 46
 13 Cal.App.4th 320, 330. This duty of candor also applies to the litigants. *U.S. v. Shaffer*
 14 *Equipment Co.* (1993) 11 F.3d 450.

15 Our adversary system for the resolution of disputes rests on the unshakable
 16 foundation that truth is the object of the system's process which is designed
 17 for the purpose of dispensing justice. However, because no one has an
 18 exclusive insight into truth, the process depends on the adversarial
 19 presentation of evidence, precedent and custom, and argument to reasoned
 20 conclusions-all directed with unwavering effort to what, in good faith, is
 believed to be true on matters material to the disposition. Even the slightest
 accommodation of deceit or a lack of candor in any material respect quickly
 erodes the validity of the process. As soon as the process falters in that
 respect, the people are then justified in abandoning support for the system
 in favor of one where honesty is preeminent.

21 *U.S. v. Shaffer Equipment Co.* (1993) 11 F.3d 450, 457.

22 Here, Progressive had its lawyer, Ronald Funnel, submit a declaration attached to
 23 its Application for Default Judgment by Court Against Arrellano which is misleading and
 24 omits from the record the complete correspondence between Tran's prior attorney and
 25 Progressive related to Tran's policy limit demands on Progressive.

26 Specifically, the Declaration of Ronald P. Funnel is designed to mislead this Court
 27 into believing that Progressive tendered Arrellano's policy limits and that Tran's prior
 28 attorney refused to accept it. Exhibit 12 Declaration of Ronald Funnel.

1 The Funnel declaration only attaches a January 26, 2007, policy limit demand
 2 letter from Anh Nguyen and a February 2, 2007, letter from Progressive purporting to
 3 tender its policy limits. Exhs. 3 and 4 (attached also to the Funnel declaration). *See*, Exh.
 4 12, the Declaration of Ronald P. Funnel, p. 3, lns. 13-17, wherein he states that
 5 Progressive tendered its policy limits.

6 However, the Funnel declaration omits a March 2, 2007, letter from Progressive
 7 wherein Progressive rejects Tran's policy limit demand and refuses to tender Arrellano's
 8 policy limits because of a possible property damage claim by the City of San Diego
 9 against Arrellano. Exh. 5.

10 The Funnel declaration also omits a March 14, 2007 letter from Anh Nguyen
 11 which puts Progressive on notice that he is rejecting Progressive's March 2, 2007 letter as
 12 a counter-offer to his policy limit demand. Exhibit 13.

13 Finally, the Funnel declaration also omits a March 15, 2007, letter from
 14 Progressive which is another rejection of Tran's January 26, 2007, policy limit demand.
 15 Exh. 6; Decl. of Anh Q. D. Nguyen.

16 The omission of these letters from the Funnel declaration was either done
 17 intentionally by Mr. Funnell, or Progressive, as part of its scheme to mislead this Court,
 18 withheld the damaging letters from its lawyers in an attempt to obtain Arrellano's default.

19 **VI. THIS COURT HAS THE POWER TO IMPOSE SANCTIONS AGAINST
 20 PROGRESSIVE AND ITS ATTORNEYS**

21 **A. This Court May Sanction Both Progressive and Its Attorneys**

22 Federal courts have inherent power to impose sanctions against both attorneys and
 23 parties for "bad faith" conduct in litigation or for "willful disobedience" of a court order.
 24 *Chambers v. NASCO, Inc.* (1991) 501 U.S. 32, 43.

25 The court's inherent power to sanction may be imposed against the party or entity
 26 who controls the litigation and is responsible for the abusive conduct, even if not a party
 27 thereto. *Lockary v. Kayfetz* (9th Cir. 1992) 974 F.2d 1166, 1169.

28 Moreover, "Bad faith" conduct may be sanctioned under the court's inherent

1 powers even if it is also sanctionable under other rules, such as Rule 11 or 28 USC §
 2 1927: “These other mechanisms, taken alone or together, are not substitutes for the
 3 inherent power, for that power is both broader and narrower than other means of
 4 imposing sanctions.” *Chambers v. NASCO, Inc.*, supra, 501 U.S. at 46–48.

5 **B. Progressive and Its Attorneys Acted in Bad Faith**

6 Bad faith conduct was shown where an attorney seriously misled the court by
 7 misquoting or omitting material portions of documentary evidence. *Lipsig v. National*
 8 *Student Marketing Corp.* (DC Cir. 1980) 663 F.2d 178, 181.

9 Here, the Funnel declaration omits material portions of the documentary evidence.
 10 Funnel omitted all of progressive letters contained in the Anh Q.D. Nguyen declaration
 11 which indicate the Progressive rejected Trans’ policy limit demand.

12 The fact that Funnel omitted this critical documentary evidence in an Application
 13 to take Arrellano’s default is even more despicable and indicates bad faith.

14 **C. Both Progressive and its Attorneys Should be Sanctioned**

15 Progressive finds no protection because its complaint was dismissed for lack of
 16 jurisdiction. A frivolous complaint may be sanctionable under Rule 11 even where the
 17 case is later dismissed for lack of federal jurisdiction. *Willy v. Coastal Corp.* (1992) 503
 18 U.S. 131, 139; *Buster v. Greisen* (9th Cir. 1997) 104 F.3d 1186, 1190. Rule 11 is violated
 19 where the claim is not warranted by existing law or a “nonfrivolous” argument for change
 20 of that law. Fed. Rules of Civ. Proc. Rule 11(b)(2).

21 Here, based upon well settled law which Progressive never bothered to investigate
 22 its violation of Rule 11 was shown because it was “patently clear that a claim has
 23 absolutely no chance of success under the existing precedents, and ... no reasonable
 24 argument can be advanced to extend, modify or reverse the law as it stands ... ” *Eastway*
 25 *Construction Corp. v. City of New York* (2nd Cir. 1985) 762 F.2d 243, 254.

26 Or, stated differently, the standard is violated if no “plausible, good faith argument
 27 can be made by a competent attorney to the contrary.” Rule 11(b)(2) establishes an
 28 objective standard that is designed to eliminate any “empty-head pure-heart” justification

¹ for patently frivolous arguments. *Zaldivar v. City of Los Angeles* (9th Cir. 1986) 780 F.2d 823, 829, 833.

3 Progressive, in its opposition to Tran's motion to dismiss, did not even bother to
4 make any arguments that the law prohibiting the use of extra-contractual damages to
5 create diversity jurisdiction should be changed or for some reason, should not be applied
6 to the facts of this case. Hence it finds no protection now in claiming it was attempting a
7 non-frivolous argument for a change in the law.

8 | VII. REQUESTED SANCTION

9 This Court should consider: 1) Ordering Progressive to not file another complaint
10 against Arrellano in federal court without paying for an independent attorney to represent
11 him pursuant to California Civil Code § 2860; 2) Order Progressive to pay for and retain
12 an independent attorney now to inform Arrellano of what Progressive attempted to do to
13 him, what Progressive’s federal complaint means and what could have happened had
14 Progressive been successful in taking his default; 3) Order Progressive and its attorneys to
15 pay monetary sanctions to the Court for causing a waste of judicial resources and for their
16 attempt to manipulate the judicial system and for omitting documentary evidence in
17 papers submitted to the Court.

18 | VIII. CONCLUSION

19 For all of the above reasons, Tran requests that this Court grant his motion for
20 sanctions.

22 || May 10, 2008

ANGELO & DI MONDA, LLP

S/Joseph Di Monda
Joseph Di Monda,
Attorneys for Defendant Tran

1 **DECLARATION OF JOSEPH DI MONDA, ESQ.**

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3
4 I, Joseph Di Monda, declare:

- 5
6 1. I am over the age of 18 years, I have personal knowledge of the facts stated herein
7 and if called as a witness I would and could competently testify as follows;
- 8 2. I am an attorney at law duly admitted to practice before all the courts of the State
9 of California and the U.S. District Court for the Southern District of California and
10 the attorney of record herein for Defendant, Bun Bun Tran in support of his
11 Motion for Sanctions against Progressive West Insurance Company and its
12 attorneys Robbie & Matthai.
- 13 3. Bun Tran is presently at Coronado Sharp Medical Center in a non-communicative
14 vegetative state.
- 15 4. I have been informed and believe that Tran's lifetime medical care costs will be in
16 the range of \$0 million dollars.
- 17 5. In this federal action, Progressive used substituted service on Tran by serving his
18 guardian ad litem's neighbor.
- 19 6. I spoke to Randy Winet of Winet, Patrick & Weaver, Arrellano's Progressive paid
20 lawyers int eh State Action. Mr. Winet told me that Progressive refused to pay for
21 Arrellano's defense in this federal action.
- 22 7. Angelo & Di Monda has filed a motion in the San Diego Superior Court to
23 disqualify the law firm of Winet, Patrick & Weaver as Arrellano's counsel in the
24 State Action.
- 25 8. Exhibit 1, attached hereto is a true and correct copy of Arrellano's Arrest Report
26 from the November 18, 2006 accident with Tran.
- 27 9. Exhibit 2, attached hereto is a true and correct copy of the San Diego Superior
28 Court Complaint for damages against Arrellano et al.

- 1 10. Exhibit 3, attached hereto is a true and correct copy of a January 26, 2007 letter
2 from Tran's prior counsel, Anh Q.D. Nguyen to Progressive demanding
3 Arrellano's Policy limits. Said letter is attached to the Declaration of Anh Q.D.
4 Nguyen.
- 5 11. Exhibit 4, attached hereto is a true and correct copy of a February 2, 2007 letter
6 from Progressive to Anh Q.D. Nguyen purporting to be an acceptance of Tran's
7 demands for Arrellano's policy limits. Said letter is attached to the Declaration of
8 Anh Q.D. Nguyen.
- 9 12. Exhibit 5, attached hereto is a true and correct copy of a March 2, 2007 letter from
10 Progressive to Anh Q.D. Nguyen rejecting Tran's policy limit demand. Said letter
11 is attached to the Declaration of Anh Q.D. Nguyen.
- 12 13. Exhibit 6, attached hereto is a true and correct copy of a March 15, 2007 letter
13 from Progressive to Anh Q.D. Nguyen rejecting Tran's policy limit demand. Said
14 letter is attached to the Declaration of Anh Q.D. Nguyen.
- 15 14. Exhibit 7, attached hereto is a true and correct copy of the Proof of Service of the
16 Federal Complaint on Tran's guardian ad litem, showing substituted service on a
17 Julia Abastillas, co-tenant.
- 18 15. Exhibit 8, attached hereto is a true and correct copy of a May 7, 2008 letter from
19 the law firm of Winet, Patrick & Weaver stating that Progressive refused to pay for
20 Arrellano's defense in this Federal Action.
- 21 16. Exhibit 9, attached hereto is a true and correct copy of a November 28, 2007 letter
22 from Angelo & Di Monda, LLP, wherein Christopher E. Angelo offers to obtain
23 independent legal counsel for Arrellano.
- 24 17. Exhibit 10, attached hereto is a true and correct copy of a November 30, 2007
25 letter from Randy Winet instructing Angelo & Di Monda, or anyone else, to not
26 contact Arrellano for any reason.
- 27 18. Exhibit 11, attached hereto is a true and correct copy of a April 18, 2008 letter
28 from Randy Winet wherein Mr. Winet states that his law firm also represents AIG

1 Insurance Company.

- 2 19. Exhibit 12, attached hereto is a true and correct copy of the Ronald P. Funnel
3 declaration submitted to this Court in support of Progressive's Application for
4 default judgment against Arrellano, wherein Mr. Funnel provides this Court with
5 only part of the documentary evidence related to Tran's policy limit demand on
6 Progressive and Progressive's response.
- 7 20. Exhibit 13, attached hereto is a true and correct copy of a March 14, 2007 letter
8 from Anh Q.D. Nguyen to Progressive. Said letter is attached to the Declaration of
9 Anh Q.D. Nguyen.
- 10 21. Exhibit 1, attached to Tran's Requests for Judicial Notice is a true and correct copy
11 of Tran's Motion to Dismiss for Lack of Federal Jurisdiction.
- 12 22. Exhibit 2, attached to Tran's Requests for Judicial Notice is a true and correct copy
13 of Progressive's Opposition to Tran's Motion to Dismiss.
- 14 23. Exhibit 3, attached to Tran's Requests for Judicial Notice is a true and correct copy
15 of this Court's January 7, 2008 Order vacating oral arguments on Tran's Motion to
16 Dismiss.
- 17 24. Exhibit 4, attached to Tran's Requests for Judicial Notice is a true and correct copy
18 of Progressive's Request to Enter Default against Arrellano in the Federal Action.
- 19 25. Exhibit 5, attached to Tran's Requests for Judicial Notice is a true and correct copy
20 of Tran's Motion to Set Aside Arrellano's Default.
- 21 26. Exhibit 6 attached to Tran's Requests for Judicial Notice is a true and correct copy
22 of the Clerk of the U.S. District Court's Default against Arrellano.
- 23 27. Exhibit 7, attached to Tran's Requests for Judicial Notice is a true and correct copy
24 of Progressive Application for Default Judgment Against Arrellano.
- 25 28. Exhibit 8, attached to Tran's Requests for Judicial Notice is a true and correct copy
26 of this Court's Order dismissing Progressive's Federal Action for lack of diversity
27 jurisdiction.

28 ///

1 I declare under penalty of perjury under the laws of the State of California that the
2 foregoing is true and correct.

3
4 May 12, 2008
5

6 S/Joseph Di Monda
7 Joseph Di Monda
8 Attorneys for Bun Bun Tran
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1 **DECLARATION OF CHRISTOPHER E. ANGELO, ESQ.**

2 I, Christopher E. Angelo, declare:

- 3 1. I am over the age of 18 years, I have personal knowledge of the facts stated herein
4 and if called as a witness I would and could competently testify as follows.
- 5 2. I am an attorney at law duly admitted to practice before all the courts of the State
6 of California and the U.S. District Court for the Southern District of California and
7 the attorney of record herein for Defendant, Bun Bun Tran in support of his
8 Motion for Sanctions against Progressive West Insurance Company and its
9 attorneys Robbie & Matthai
- 10 3. Leonel Arrellano was arrested and pled guilty to various felonies arising out of the
11 November 18, 2006 accident with Bun tran.
- 12 4. Leonel Arrellano is presently incarcerated at the Sierra Conservation Center and
13 serving a 6 year term.
- 14 5. Arrellano is an indigent illegal alien who does not speak, read or understand
15 English.
- 16 6. Arrellano will be deported to Mexico upon his release from prison.
- 17 7. Arrellano's attorneys in the State personal injury lawsuit, Winet, Patrick & Weaver
18 are being paid by Progressive and know Arrellano is incarcerated.
- 19 8. The federal summons and complaint in this action was not personally served upon
20 the guardian ad litem but was served suing substituted service on a neighbor of the
21 guardian ad litem who is not a family member nor authorized to accept service on
22 behalf of Tran's guardian ad litem.
- 23 9. Progressive knows I represent defendant Tran but made no attempt to contact me
24 about the federal lawsuit.
- 25 10. I have been attempting to obtain an assignment of Arrellano's bad faith action
26 against Progressive but his State Action lawyers, Winet, Patrick & Weaver will not
27 cooperate in having Arrellano assign his bad faith rights to Tran. Instead, Winet,
28 Patrick & Weaver claim that Progressive must agree to any assignment of

1 Arrellnao's bad faith rights to Tran.

2 11. The firm of Winet, Patrick & Weaver wants Tran to promise never to execute the
 3 overlimits judgment on against Arrellano, but Progressive refuses to agree that it
 4 never argue in any subsequent bad faith lawsuit that this covenant invalidates the
 5 ability of its insured to make an assignmet to Tran.

6 12. If Tran agrees to those terms, Progressive will argue that there is no bad faith
 7 because tran waived his right to collect any over-limit judgment.

8 13. Arrellano has little to offer of substance to Tran except for his bad faith rights.

9 14. In the past I asked Randy Winet to allow independent personal counsel to advise
 10 Arrellano related to the federal lawsuit. I even recommended an attorney by name
 11 who speaks Spanish.

12 15. The law firm of Winet, Patrick & Weaver threatened me with State Bar action if I
 13 made any attempt to obtain independent counsel for Arrellano to defend himself
 14 for any reason at any time.

15 16. Winet, Patrick & Weaver claimed that only they could contact Arrellano because
 16 they were representing him. However, they did not represent him in the Federal
 17 Action.

18 17. Whenever I propounded discovery against Arrellano, his lawyers, Winet, Patrick &
 19 Weaver, would ask for time extensions to answer because they claimed difficulty
 20 in contacting him.

21 18. I was therefore surprised at how quickly Arrellano was able to respond to Chili's
 22 Requests for Admissions.

23 I declare under penalty of perjury under the laws of the State of California that the
 24 foregoing is true and correct.

25 May 12, 2008

27 _____
 28 S/Christopher E. Angelo
 Christopher E. Angelo
 Attorneys for Bun Bun Tran